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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 8, 2003

Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: FCC 03-125 – Notice of Proposed Rulemaking, Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process

Dear Commissioners,

I appreciate the opportunity to present the views of the Eastern Shoshone Tribe regarding the Federal Communications Commission's Notice of Proposed Rulemaking concerning the draft Nationwide Programmatic Agreement (Agreement).

The Eastern Shoshone Tribe of the Wind River Reservation is a federally recognized Indian tribe with approximately 3,500 members. The Wind River Reservation, which consists of more than two million acres, is located in central Wyoming and is home to two Tribes, the Eastern Shoshone and the Northern Band of the Arapaho (Tribes). There are also approximately 25,000 non-Indians living within the exterior boundaries of the Reservation.

On March 16, 2001, the Federal Communications Commission (Commission), the Advisory Council on Historic Preservation (Council), and the National Conference of State Historic Preservation Officers (Conference) executed a Nationwide Programmatic Agreement for the Collocation of Wireless Antennas effectively streamlining the review process concerning the placement of antennas on existing towers. Now, the Commission, Council, and Conference propose to streamline this process even further, in part, by broadening the types of undertakings exempt from Section 106 review to include the construction and modification of certain facilities. At the request of Vernon Hill, Chairman of the Eastern Shoshone Tribe of the Wind River Reservation, I provide the following comments.

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Government-to-Government Consultation

Federal agencies engaged in a "federal undertaking" are required by the National Historic Preservation Act (NHPA) to "take into account the effect" an undertaking may have on historic properties "included," or "eligible for inclusion," on the National Register of Historic Places. 16 U.S.C. Section 440(f). The consultation process guaranteed by Section 106 is vital to identifying the potential impacts of an undertaking, and thereby protecting historic properties. *See* 36 CFR Part 800. While not intended to preserve every historic property, or serve as veto authority, the Section 106 process is critical to mitigating impacts should the undertaking move forward. "Streamlining" this process and thereby reducing consultation should be approached tentatively.

I feel it important to begin by underscoring the diversity of Indian country as this realization is critical when seeking its input. Tribes are unique in many ways: culture, land base, population, and governmental structure, to name only a few. Our views are so varied as to make it not only impossible, but also somewhat ludicrous to think that only one Tribe, or even a few, can speak collectively for all. It is equally troubling to suggest that one regulation or one document can address our varied circumstances. Regardless, I present the experiences of the Wind River Reservation and our thoughts concerning the draft Agreement.

The Eastern Shoshone Tribe is concerned with the Commission's proclivity to delegate its obligation to consult with Indian tribes, particularly with regard to undertakings that may affect sites of religious or cultural significance. One attribute shared by all Tribes is sovereignty, and the government-to-government relationship we share with the United States is not to be taken lightly. Many Commission actions, whether on or off tribal lands, trigger its obligation to consult with Tribes. This obligation cannot be delegated, most certainly not to private entities. While the Commission indicates within the Agreement's introduction that it is not delegating its consultation obligations, Alternative A to Section IV appears to do just that. For various reasons, we cannot support Alternative A.

For one, our experience with private entities has not always been positive. Both the Eastern Shoshone and Northern Arapaho Tribes feel they have suffered financially as a result of communication tower companies circumventing the Tribal Councils. Instead of recognizing the Tribal Councils as the primary contacts, private companies have initiated contact with the Bureau of Indian Affairs (BIA), and then interacted with the Councils through the BIA. Because the BIA has failed to counsel the Joint Tribes on either the fair market value or standard off-reservation rates for telecommunication contracts, we have been saddled with leasing contracts in amounts far below fair market value. Unfortunately, this situation is not unique to the Wind River Reservation.

Tribes, as sovereign nations, have the right to exercise civil regulatory authority over activities occurring on their reservation, including telecommunication activities. It is important that Tribes build, own, and manage the space leasing contracts on all towers located on tribal lands. Applicants should be required to negotiate such contracts with Tribal governments, and Tribes should be encouraged to gain ownership of existing towers by purchasing those towers as their leases expire. We realize that private entities do not necessarily have these same goals in mind, regardless of whether their activities occur on or off tribal lands.

While the Agreement attempts to bestow the importance of tribal consultation on the Applicant, these private entities, by their very nature, are not under the same obligation as the federal government to consult. Consequently, any attempt to delegate this responsibility should be avoided. We therefore support Alternative B to Section IV of the Agreement, offered by the United South and Eastern Tribes (USET), which achieves the goal of streamlining the review process, while more appropriately adhering to the Commission's obligation to consult with Tribes on a government-to-government basis.

Notice to Tribes Regarding Exempted Undertakings

At Section III.A., the Agreement lists various undertakings that have been identified as being unlikely to adversely affect historic properties. As such, the Agreement would exclude these undertakings from the Section 106 process. The Commission seeks input as to whether, notwithstanding these exclusions, any Tribe with "aboriginal and/or historic associations to the area in which the Undertaking is to occur" should continue to be notified of the proposed undertaking and provided an opportunity to comment on its potential effect upon historic properties.

At issue is the balance between protecting historic properties and simplifying the review process where the risk of adverse impact is minimal. Key to our analysis here is the impact on tribal lands.

As written, the Agreement does not apply to tribal lands. Within Section I.D., however, a Tribe may elect its application to their reservation. We believe that where tribal lands are impacted, not only should the Tribe be notified and provided an opportunity to comment, but that they should spearhead the process through their own Tribal Historic Preservation Office. For many reasons, which I discuss more fully below, tribes should be encouraged to develop Tribal Historic Preservation Offices and provided the funding and technical assistance to do so. No other action will have as great an impact upon the streamlining of federal actions than the creation of additional Tribal Historic Preservation Offices.

Undoubtedly, the greatest danger to the protection of historic properties lies with entirely new undertakings, or with modification to an existing undertaking where the appropriate Tribes were not previously consulted. For example, under Section III.A.1, "[m]odification of a tower and any associated excavation that does not involve a collocation and does not substantially increase the size of the existing tower" would be an undertaking exempt from submission to the SHPO/THPO for review. Because this situation involves *modification* of an *existing* tower, it is not an entirely new undertaking.

With regard to off-reservation undertakings, so long as each Tribe with "aboriginal and/or historic associations to the area" was consulted during the original undertaking, and they determined that the undertaking would not adversely affect a historic property, it seems unlikely that this current undertaking could adversely affect such a property. While I believe that these

Tribes should always be notified of the proposed undertaking, an invitation to comment yet again seems to serve little if any value.

As a result, we recommend retaining the parenthetical language in Section III.A stating: "unless an Indian tribe indicates pursuant to Section III.B that a Historic Property of traditional, religious, or cultural importance to that tribe may be adversely affected by the proposed Undertaking." We further recommend modifying the language in Section III.B to clarify that while notice of an undertaking should always be provided, an opportunity to comment is not required where documented evidence shows that each Tribe with "aboriginal and/or historic associations to the area" was consulted during the original undertaking, and that each Tribe determined that the undertaking would not adversely affect a historic property.

Procedural Problems

I would also like to address for a moment a larger issue impacting the Eastern Shoshone Tribe. With regard to communication towers on the Wind River Reservation, it has been our experience that the problems lie not necessarily with the regulations, but instead with the manner in which they are implemented. I illustrate this point by describing my experiences as Tribal Planner, working together with the Northern Arapaho Tribal Planner, to address the issues surrounding telecommunication towers on our Reservation.

When I first encountered the archeological process, previous Tribal Councilmen told me that the Tribes could hire their own archeological consultant to screen and clear areas for construction. While working with the Bureau of Indian Affairs (BIA) to obtain the proper rights-of-way and construction permits, this assertion was confirmed. What I was not told, however, was that the work of our consultant would not be accepted until BIA personnel repeated the work themselves. In fact, we did not learn of this policy until much later in the process, after the Tribes had hired a consultant and expended significant monies. We also learned that because of the BIA's heavy workload, they could not be held to any timeframes and that it could be months before they were able to verify our consultant's work.

Because of this policy's obvious waste of time, money, and effort, we organized a meeting with the BIA to address the redundancy. In the end, the BIA agreed to accept the physical work performed by our consultant. While seemingly resolving the issue, we learned later that BIA personnel still insisted upon reviewing, and ultimately approving, our consultant's work. Again, because of their workload, it may still be months before this could occur.

For some time, I was left with little hope that progress on our Reservation could occur at much more than a snails pace. Since this time, however, the Tribal Archeologist has continued discussions with the BIA, resulting in a collaborative working relationship whereby the review process has been greatly accelerated. This result has been a significant improvement.

I raise this because again, I am aware that this situation is not unique to the Wind River Reservation. And while addressing problems within a regulation is a start, it does not always

address the entire problem. This experience also serves as a basis for my next comment, the need for Tribal Historic Preservation Offices.

Tribal Historic Preservation Offices

A discussion of streamlining would be incomplete without discussing Tribal Historic Preservation Offices. While we have been fortunate enough to work with the BIA to overcome our most notable obstacles, it took time and money. The presence of a Tribal Historic Preservation Office (THPO) would have alleviated these challenges, and of particular relevance here, would help to streamline federal undertakings such as those addressed within the Agreement.

To start, the initial point of contact at the tribal level would be evident, making it easier for private entities to satisfy their obligations. THPOs would ensure that interactions between the Tribe and private entities are handled efficiently, and that they follow proper procedure. The need for streamlining the process in other ways, such as exempting additional undertakings from Section 106 review, would be lessened, and the overall goals of the NHPA less compromised. Overall, the system would be more efficient, while at the same time, less administratively burdensome.

Furthermore, having addressed many of theses issues and formulated guiding policies and procedures in the establishment of the THPO, Tribes would be better able to respond to inquiries from private entities. Our hope is to identify potential tower sites and consider their potential impact upon properties of cultural or religious significance in advance of outside contact. As I stated previously, it is important that Tribes build, own, and manage the space leasing contracts on towers located on tribal lands. Creating a database of these sites, both on and off tribal lands, is an important component of reaching this goal.

Revisiting my earlier comment regarding the diversity of Indian country, no one is better able to address the unique needs of a Tribe than the Tribe itself. This is certainly true in the area of historic preservation. While one set of regulations at the federal level may prove helpful as a reference, it can by no means adequately address the vast array of circumstances throughout Indian country.

For instance, a number of access roads on our Reservation have sustained tremendous damage as a result of private entities entering tribal lands to gain access to communication towers. A federal regulation is not necessary to resolve this issue; it should be resolved at the local level, by a THPO. Again, Tribes should be provided the encouragement, technical assistance, and financial resources to establish their own Historic Preservation Offices. The Commission could assist with identifying financial resources for tribes to, for example, pre-permit potential tower sites. Actions such as these would prove valuable to streamlining federal undertakings such as those discussed in the Agreement.

Confidentiality

Another significant issue within the Agreement lacking consensus is that of confidentiality. Information regarding sites of religious or cultural significance to a Tribe is very sensitive and should always be maintained as highly confidential. This information should not be placed on web sites, or otherwise broadcast to those who may wish to locate and loot these sites.

As has unfortunately been proven in the past, confidentiality is critical to safeguarding these culturally significant resources. Because harm to a site cannot be undone, the bar should naturally be set high. The Tribes concur with the position of USET that "confidentiality restrictions should be in place on Applicants whether or not a tribe or NHO has requested confidentiality." THPOs could serve an important role here as well by maintaining greater control over the people and entities who have access to culturally sensitive information and data.

Thank you for the opportunity to provide the views and experiences of the Eastern Shoshone Tribe with regard to communication towers on the Wind River Reservation and the draft Agreement. We ask that our concerns be considered as the Commission continues to examine these important issues.

Sincerely,

Edmund Meeks, Tribal Planner
Eastern Shoshone Tribe

Designated as Contact Person by:
Vernon Hill, Chairman
Eastern Shoshone Tribe